Public Workbook

Alberta Family Law Reform

2002

About this Workbook

This workbook is a consultation guide for stakeholders who wish to provide input to Alberta Justice. Section I lists proposed changes to legislation and issues that require further public input. Questions in this workbook are designed to help participants focus their thoughts and responses.

Individuals and organizations who wish to submit a written response to the questions posed in Section II of this workbook are asked to forward their comments to the Office of Family Law Reform, Alberta Justice, 4th Floor, Bowker Building, 9833-109 Street, Edmonton, AB T5K 2E8.

Additional copies of this workbook are available:

- On the web by going to www.gov.ab.ca/just/initevt/initevt.htm and clicking on "Alberta Family Law Reform".
- By contacting Alberta Justice at 780-427-5093 (dial 310-0000 to be connected toll free)
- By e-mailing your request to familylaw.reform@gov.ab.ca

In addition to questions in this workbook, Albertans may provide feedback to the Office of Family Law Reform on other aspects of the Family Law Reform Project.

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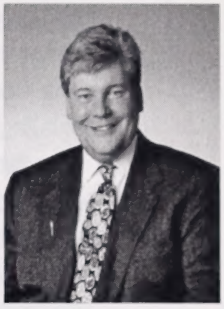
Message from the Minister of Justice and Attorney General



Albertans want this province's family law made simpler and more accessible. As a result, Alberta Justice is leading the Family Law Reform Project to review all Alberta family laws, to see how we can update and consolidate them.

As you read through this workbook, you'll see that we are looking at a wide range of issues, including spousal support, child access and maintenance, and the rights and obligations of people involved in personal relationships. One thing that we are not looking at is the institution of marriage. The Alberta government believes that marriage is fundamentally a union between a man and a woman. Alberta family law will continue to recognize this distinction.

But because the courts have indicated that all individuals must be treated equally in terms of access to the law under the Canadian Charter of Rights and Freedoms, some people feel that the concept of marriage is under attack when provinces are required by the courts to rewrite their laws. I do not believe that is the case. As lawmakers, we have an opportunity to write our legislation in a manner that protects the traditional fabric of our society including the definition of marriage and spouse, while at the same time recognizing the changing ways in which people associate and create interdependency. We also have the opportunity to ensure that in those areas where government and family law are involved, such as when personal relationships break down, the mechanisms we have in place not only provide for any dependency created within a relationship, but also has rules for resolving disputes that may occur.

As is the trademark of this government, Alberta Justice is asking Albertans for their input on these important topics. After reviewing the workbook, I encourage you to provide us with your thoughts.

Like most aspects of our lives, families have evolved significantly over the years. Your feedback will help us ensure our province's family law is up-to-date and serves the needs of Alberta families in the 21st century. Thank you for your input.

Dave Hancock, Q.C.
Minister of Justice and Attorney General

About the Alberta Law Reform Project

Mandate

The Government of Alberta through Alberta Justice is conducting a review of existing provincial family law. Called the Alberta Family Law Reform Project, its mandate includes determining where legislation can be consolidated, updated and improved. The main goal of family law reform is to make family law more understandable and accessible to Albertans.

As part of the Family Law Reform Project, Alberta Justice is consulting with professionals and the general public on a variety of family law issues.

Consultation Process

The public consultation on family law reform involves discussion with stakeholders on traditional family law and personal relationships issues. These issues include child support, spousal support, guardianship, custody and access, court jurisdiction and powers, and interdependent relationships.

Special interest groups, professionals, and interested members of the public will be invited to provide their input through round table discussions, focus groups, and written submissions. Family law issues of a technical nature will be discussed with lawyers, academics, judges, and other family law experts in a separate series of round tables.

Section I

Proposed Changes and Issues for Discussion

Alberta Justice has proposed a number of changes to current family law. While not the focus for public discussions, stakeholders are welcome to review the proposed changes and provide comments in writing to Alberta Justice.

The proposed changes are based on research, consultation, precedent, and input from the Alberta Law Reform Institute. The Institute's contribution to the Family Law Reform Project has been significant, having produced three major reports in 1998 on spousal support, child support, and child guardianship, custody and access. There are also a number of technical issues that require more input before Alberta Justice can recommend changes.

This section lists, in five categories, Alberta Justice's proposed changes and those issues requiring more input. Issues are followed by questions that readers are asked to consider.

1. Spousal Support

Overview

Under Canada's Constitution, the federal government has responsibility for issues involving divorce, including spousal support when applied for at the time of divorce. Provincial legislation governs all other relationships.

In Alberta, the *Maintenance Order Act* and the *Domestic Relations Act* address spousal support matters. Many aspects of these Acts, and other legislation governing marriage and interdependent relationships, have become out-dated over time.

For example, until recently the *Domestic Relations Act* permitted only married spouses to apply for spousal support. This changed in 1998 following a Court of Appeal decision that said it was unconstitutional, for the purposes of spousal support, to distinguish between persons who are married and persons who are in common law relationships. Spousal support legislation was changed in 1999 to include married persons and persons in common law relationships.

1.1. Extended Family Support

Currently, children have a legal obligation to support their parents. Similarly, parents and grandparents have a legal obligation to support their children and grandchildren. Alberta Justice proposes that the extended family support obligation within the *Maintenance Order Act* be discontinued. New legislation will limit the legal support obligation to parents supporting children, and to spouses supporting each other.

1.2. Basic Support

It is proposed that new legislation contain a general statement about basic spousal support obligations. Persons in relationships where support obligations apply, such as marriage and common law relationships, will be obligated to support each other during and after the breakdown of the relationship until such time as the court terminates the obligation.

New Alberta legislation will allow a support obligation to be made:

a) Where the persons are living separate and apart.
b) Where the persons are not living separate and apart but are experiencing discord of such a degree that they cannot reasonably be expected to live together.
c) Where the persons are not living separate and apart, but one person has refused or neglected to provide the other, without sufficient cause, with food and other necessities when able to do so.

1.3. Assessment of Support

Alberta Justice proposes that Alberta's legislation concerning support obligations use the language, rationale and criteria of the federal *Divorce Act*. This move would make Alberta's law consistent with federal legislation.

1.4. Marital Misconduct

It is proposed that, as with the *Divorce Act*, evidence of marital misconduct (i.e. adultery, cruelty) no longer be required to give the court jurisdiction to make a support order. Generally, marital misconduct would no longer be considered in the assessment of support. Only economic implications – either regarding the need for support or regarding the ability to pay – would be considered.

1.5. Natal Expenses and Pledging of Credit

It is proposed that the court be given the power to order prenatal, birth and postnatal expenses for the mother, whether or not the child survives. This would extend a power available to the court now in the case of unmarried mothers under the *Parentage and Maintenance Act*.

Before married women had independent legal status, a married woman did not have a separate legal existence from her husband. If her husband abandoned her, she was legally entitled to obtain the necessities of life in her husband's name. The need for this law is now outdated. It is proposed, therefore, that the common law right of a wife to pledge her husband's credit after separation be abolished. It is also proposed that the common law presumption that a deserted wife may act as an agent of her husband to render him liable for necessities, be abolished.

1.6. Unmarried Cohabitants

Legislation that deals with unmarried cohabitants is further covered in this workbook under the section Personal Relationships. See page 29.

2. Child Support

Overview

The federal government has responsibility for child support matters at the time of divorce. Provincial legislation deals with the support of children in all other cases, including after a divorce if no federal order for support has been made.

In Alberta, several pieces of legislation deal with child support. These include the *Maintenance Order Act*, *Domestic Relations Act*, *Parentage and Maintenance Act*, and *Maintenance Enforcement Act*. Currently, there are a number of inconsistencies between these Acts or between these Acts and the federal *Divorce Act*. Family Law Reform is attempting to eliminate these inconsistencies.

2.1. Child Support

Use of federal child support guidelines is mandatory when the courts determine child support under the *Divorce Act*. And while this is not the case under current Alberta law, courts considering child support matters under provincial legislation also use the federal guidelines. To formalize this practice, it is proposed that Alberta adopt legislation that makes the use of the federal child support guidelines mandatory. It is further proposed the law recognize the following principles:

- That a parent has a basic obligation to support a child.
- That children should be treated equally. This includes children of marriages and other relationships; children of first and subsequent relationships.
- That the obligation to support a child rests only with a child's parents (or a child's guardians if they are not the same as the parents).
- That the support obligation of a child's parents begins at the child's birth.
- That child support is given priority over spousal support.

2.2. Age of Maturity

Issue for discussion: The age at which child support should end.

Background:

Under the federal *Divorce Act*, there is an obligation to support a child of the marriage. A child of the marriage is defined as someone under the age of majority. In Alberta, that is 18 years of age. Current Alberta legislation concerning child support varies between 16 and 18, depending on the Act. It is proposed that provincial legislation be changed to make a child's 18th birthday the consistent cut-off point for support.

It is recognized in federal law and in society that some children may be independent before age 18 or require parental support after they turn 18. Two exemptions to Alberta's new age of maturity legislation are being contemplated:

- The child support obligation would end if a child has voluntarily left home before age 18 to pursue an independent lifestyle. Parents would be required to provide child support again if the child returned to his or her parents' care before the age of 18.
- The child support obligation could continue if a child 18 years of age or older cannot become independent because of illness, disability or some other cause.

There is also some debate about who should be legally liable under Alberta law to support a dependent child over the age of majority. Under the federal *Divorce Act*, separated or divorced parents have a legal obligation to support dependent children over the age of 18 if they cannot become independent because of illness, disability or some other cause. The provincial *Domestic Relations Act* uses a similar test for children over the age of 16 where the parents are separated. The *Alberta Maintenance Order Act* requires parents to support children over 16 who are handicapped or unable to work.

Under the *Divorce Act*, courts have interpreted "other cause" to include a child who is a student pursuing further education. Some people have suggested a legal obligation to support a child 18 years of age or older attending school should be restricted to the completion of high school.

Questions:

2.2.a. Should child support by a parent continue once a child turns 18?

2.2.b. If support should continue, should there be a distinction made between intact families and families that have separated?

2.2.c. If support should continue, should support be limited to:

- Children who have an illness or disability?
- Children who are engaged in further education (i.e. attending high school, college or university)?
- Children who are otherwise unable to become independent?

2.3. Definition of Parents

Alberta Justice proposes that parents be defined as biological parents, adoptive parents or persons found by the courts to be parents. It is further proposed that the current presumption of parentage in the *Domestic Relations Act* be expanded to include a situation where the person cohabited with the mother of the child for at least 12 consecutive months immediately before, during or after the birth of the child and where that person has acknowledged that he is the father of the child. An acknowledgement of paternity alone would be sufficient to establish parental obligations, but not to establish parental rights.

Sperm donors would have no parental obligations or rights under the proposed new legislation unless there was an agreement to the contrary. This is consistent with 1991 Uniform Law Conference of Canada legislative provisions that have been adopted by Newfoundland and the Yukon. These provisions include:

- A man whose own genetic material was used to artificially inseminate the woman with whom he is married or cohabiting is deemed to be the biological father of a child, even if his genetic material was mixed with other genetic material.
- Where his own semen was not used to artificially inseminate the woman with whom he is married or cohabiting, a man is deemed to be the biological father if he consented in advance to the insemination, or if he did not consent in advance, subsequently agreed to assume the responsibilities of fatherhood, or treated the child as his own, with the full knowledge of the circumstances of conception.
- Unless there is a written agreement to the contrary, a man who donates semen but who is neither married to or cohabiting with the woman who receives it, is not the biological father of the child for any purpose, including any obligation to pay child support, or any entitlement to custody, access, or any other incident of guardianship.

2.4. Persons Standing in the Place of a Parent

Issue for discussion: Child support obligations of persons standing in the place of parents.

Background:

The break-up of a marriage or other interdependent relationship is often followed by the formation of new family groups. Another adult partner often takes on the role of mother or father to children of the previous relationship. The legal obligation of such a person is not clear in provincial legislation. The federal *Divorce Act* and legislation in many other provinces dictates that a person acting in the place of a parent is legally responsible to provide child support.

Alberta Justice proposes that the court have the discretion to order a person who stands in the place of a parent to pay child support. It is further proposed that a person may not unilaterally withdraw from a legal, parent-like relationship. This is consistent with Supreme Court of Canada decisions involving *Divorce Act* cases.

Although persons standing in the place of parents may have a legal obligation to support a child, it has been suggested that they should not fall under the same child support guidelines as a child's natural parents. Instead, the court should have discretion to make a child support order that is appropriate for the circumstances.

Question:

2.4.a. Should standard child support guidelines apply to persons acting in the place of a parent?

2.5. Child Support Applications

The government will continue to be able to apply for support on behalf of a person and assume the role of creditor, as well as continuing to have the ability to assist a person to apply for support on his or her own behalf. In addition, it is proposed the following be set into law:

- That a child, a parent, a person who has care and control of a child, or the government (where it is entitled) may make a child support application.
- That the court can, if necessary, make a child support order part of making a spousal support order.
- That a support application can be made before a child is born but can't be heard or disposed of until after the child's birth.
- That the same persons who can apply for child support may apply for interim support or to vary a support order.

- That the mother or any person acting on behalf of or in place of the mother may make a child support application to cover expenses related to pregnancy.
- That any person who incurred burial expenses for a child may make a child support application to offset burial costs.
- That a child support order be terminated upon the adoption of the child.

3. Guardianship, Custody, and Access

Overview

The law uses the concepts of guardianship, custody and access because children require adults to help them meet their needs. Guardianship is the cluster of rights and responsibilities associated with the care and raising of children. Custody and access are components of guardianship. Custody is the right to care for children full-time. Access is the right to interact with children temporarily.

The *Divorce Act* deals with custody and access matters connected to divorce. In cases other than divorce, custody and access falls under provincial jurisdiction. Within Alberta's legislation, guardianship is the fundamental concept, and custody and access are components of guardianship.

Six different provincial Acts (and the superior court's power to act in the best interests of the child in the absence of specific legislation) govern provincial guardianship, custody and access matters. Family Law Reform aims to consolidate and bring consistency to provincial legislation on these issues.

Alberta Justice proposes that new provincial law retain guardianship as the fundamental concept and:

- Define guardianship by describing a guardian's rights and responsibilities.
- Describe three ways of becoming a guardian.
- Describe the guardianship rights of parents in an intact family.
- Provide a method of determining the guardianship rights of parents in a family that is not intact.
- State that decisions made about guardianship are to be made in the best interests of children. Factors that should be considered in determining the best interests of children would be described.
- Provide guidelines to the court in determining whether access to children should be granted.

3.1. Defining Guardianship

Alberta Justice proposes that guardianship be defined in legislation as the responsibility of an adult person for the care and custody of a child, including the responsibility to determine where the child lives, the responsibility for making day to day decisions associated with caring for the child, and the responsibility to make major decisions such as those involving religion, education, health and legal issues.

The legislation may list specific rights as part of the general definition but parents or a court could change the list, or add new rights and responsibilities to meet individual circumstances.

3.2. Ways of Becoming a Guardian

The new law will continue to provide three ways of becoming a guardian of a child:

1. *Automatically* – the mother will always be the guardian of a child, and the father will be the guardian of a child if he has a substantial connection to the mother.

2. *By application to the court* – the court, acting in the child's best interest, will continue to have the power to appoint a person as the guardian of a child. It is proposed the new law provide:

    - That the Provincial Court's guardianship jurisdiction will continue, but will be removed from the *Child Welfare Act*. Although the Provincial Court's jurisdiction is found in part 5 of that legislation, its jurisdiction is not limited to *Child Welfare Act* cases.
    - That the Court of Queen's Bench and the Provincial Court should have concurrent jurisdiction over guardianship. This means that if the Provincial Court has made a guardianship order, the Court of Queen's Bench could not hear another guardianship application.
    - That the court will have the power to appoint a guardian either solely or together with another guardian or guardians and will also have the power to remove guardians.

- The test for the appointment of a guardian will be the best interests of the child.
- That the following persons be eligible to apply for guardianship:
  - A parent of the child.
  - A person standing in the place of a parent of the child.
  - A relative of the child.
  - A stepparent of the child.
  - With the court's approval, any other person acting on behalf of the child.

3. *By appointment by an existing guardian (testamentary guardianship)* – the new legislation will continue to allow a guardian to appoint in a deed or a will a guardian for his or her child that will take effect after the death of the guardian.

Currently testamentary guardianship takes effect immediately after the death of the parent who appointed the guardian, even if the other parent is still living and competent. The testamentary guardian acts as a joint guardian with the surviving parent. It is proposed that the new law give a parent the power to appoint a testamentary guardian with the condition that such guardianship would only take effect if both parents die or if the surviving parent has a disability that prevents the parent from acting as a guardian.

It is proposed that testamentary guardianship legislation also include the following provisions:

- That the nomination of a guardian be recognized if it is made in a will or in a written document that has been signed, witnessed and dated.
- That a guardian who appoints a testamentary guardian should be able to revoke that appointment at any time.
- That the testamentary guardianship nomination should only take effect if the nominated person expressly or by his or her conduct accepts the nomination.
- That if more than one person is nominated as guardian, any person so nominated can accept, even if declined by other nominated persons, unless the nominator expressly provides otherwise.
- That a guardian may appoint another person to act in his or her place if the guardian is temporarily absent or incapacitated.

- That the court has the power to remove a testamentary guardian where the court is of the opinion that to do so is in the best interests of the child.
- Except where an appointment or nomination provides for an earlier termination, guardianship would be terminated by the following:
    - The guardian's resignation or death.
    - The child turning 18 or marrying.
    - A court order removing the guardian.

Issue for discussion: Testamentary guardianship in the non-intact family.

Background:

Some people have suggested that special provision should be made for testamentary guardianship in non-intact families. For example, the law could provide that the surviving parent rather than the testamentary guardian is entitled to become the guardian, or it could provide that the surviving parent is entitled to become a joint guardian with the testamentary guardian.

Questions:

3.2.a. Should there be any special provisions to deal with testamentary guardianship in a non-intact family where the parents are no longer joint guardians?

3.2.b. Should the responsibilities of the deceased guardian flow to the surviving guardian or to the guardian appointed by the deceased guardian?

3.3. Guardianship in the Intact Family

Alberta Justice proposes that legislation provide each parent in an intact family with the rights, responsibilities and obligations of guardianship unless the guardians agree, or a court orders, otherwise. These rights, responsibilities and obligations will be spelled out in legislation. The legislation will assume that guardians in an intact family cooperate and work together but legislation will provide for those situations where cooperation and working together is no longer possible.

3.4. Guardianship in the Non-intact family

Issue for discussion: Determining parenting arrangements following a separation or where parents have never lived together.

Background:

Under Alberta's current law, parents who separate have two choices. They can continue to parent their children as they did prior to the separation (either informally or formally through a written agreement or court order) or they can establish a new parenting arrangement (either informally or formally through a written agreement or court order). Courts currently base their decisions on custody and access on the best interests of the child but the factors considered in determining parenting arrangements can be substantially different from case to case.

Ideally, parents should agree on parenting arrangements themselves. This is often difficult for parents who have never lived together or are no longer living together because of separation or divorce. Parents that cannot agree on a suitable parenting arrangement require legislation that establishes a clear, comprehensive, and flexible mechanism for determining parenting arrangements.

Preliminary consultations were conducted with a cross-section of Albertans in June 2001 to discuss different models of determining parenting roles and responsibilities after separation and divorce. The consultations did not establish clear support for any particular model of parenting responsibility over another. However, from the information gathered at these meetings the following principles were identified:

- Parenting arrangements should focus on the needs and best interests of the children.
- Legislation should recognize the child's need for continuity of relationships after parents separate, particularly with extended family.
- Both parents whether living together or apart have a contribution to make to the children's development and well-being.
- All parents should be accountable for not fulfilling their parenting responsibilities.
- Federal and provincial legislation on parenting roles and responsibilities should be consistent.
- Legislation to determine parenting arrangements should be clear to allow for certainty and flexible to respond to individual family circumstances and on-going child development.
- The legislation to determine parenting arrangements should encourage and facilitate cooperation and communication between parents.

In addition to the above principles, stakeholders emphasized the need for adequate support services such as counseling and education for parents and children experiencing separation and divorce.

Questions:

3.4.a. Should provincial and federal legislation regarding parenting arrangements be consistent?

3.4.b. Are the attributes for parenting arrangements appropriate? What changes if any would you suggest?

3.5. Best Interests of Children

Current legislation does not indicate what factors should be considered by the court in determining the best interests of children. It is proposed that new legislation include a list of factors that must be considered by the court. The court would be able to consider other factors not on the list that might be appropriate in a particular case.

It is proposed that Alberta law should provide that, in allocating the responsibilities of guardianship between guardians, courts shall ensure that the health or safety of a child should not be placed at risk.

It is further proposed that Alberta law should provide that, in allocating the responsibilities of guardianship between guardians that is in the best interests of the child, the court may consider any of the following factors:

1. The child's age;
2. The child's;
    a. health, emotional well-being and special needs,
    b. personality, character and emotional needs, and
    c. physical, psychological, social and economic needs;
3. The nature and quality of the child's relationship with each guardian.
4. The impact on the child of continuing or not continuing the child's relationship with each guardian.
5. The child's interaction with other persons residing in the child's household or involved in the care and upbringing of the child.
6. The wishes of the child with respect to residence and contact with each guardian.
7. If the child is 12 years of age or older, greater weight should be given to the views and preferences of the child.
8. The duration, stability and adequacy of the child's current living arrangements or the permanence, stability and adequacy of the family unit with which it is proposed that the child will live.
9. The desirability of maintaining continuity in the child's living arrangements, including consideration of the child's current or anticipated adjustment to home, school and community.

10. The ability and willingness of each guardian to provide the child with guidance and education, the necessaries of life and the special needs of the child.
11. The child's religious upbringing.
12. The child's ethnic and cultural heritage.
13. The plans proposed for the care and upbringing of the child.
14. Contact with the child's other parent or other guardian.
15. Whether the guardian has ever acted in a violent or abusive manner towards:
    a. this or any other child, or
    b. the child's parent or other guardian, or
    c. a member of their household.
16. The motivation of each guardian and their capacities to give the child love, affection and guidance.
17. The capacity of each guardian to cooperate or to learn to cooperate in childcare.
18. Methods to help guardians cooperate, methods for resolving disputes and each guardian's willingness to use those methods.
19. Where one of the guardians has acted in a violent or abusive manner as described in factor 15, the other guardian does not have an obligation to cooperate with that guardian in child care, and the provisions of factors 17 and 18 do not apply.
20. The effect on the child if one guardian has sole authority over the child's upbringing.
21. Any other factor the court considers relevant.

3.6. Access to Children

Issue for discussion: Eligibility of non-guardians to have access to a child.

Background:

Although some have suggested access be the right of the child, it is proposed that Alberta's family law legislation continue to treat access as one of the rights of guardianship. However, it is further proposed that new legislation give children a separate right of access so that a court could order continued access of the child

to a person with whom the child has had frequent and positive contact, whether that person is a guardian or not.

There is currently some judicial debate over whether or not a person has to be a guardian before the Provincial Court can make an access order. The proposed new law will clearly give the Provincial Court jurisdiction to make an access order in favour of someone who is not a guardian. The new law proposes to allow the following persons to apply for access:

- A guardian.
- A non-guardian who is:
    - a parent.
    - a person standing in the place of a parent.
    - a relative (eg. grandparent).
    - a stepparent.
- With leave of the court, any other person on behalf of the child.

Any access order would consider the best interests of the child. It is further proposed that some restrictions be placed on persons applying for access who are not guardians to guard against potentially negative family disruptions and to respect the guardian's right to decide what is in the best interests of the child.

Access applications by persons who are not guardians could be restricted to situations where the guardians or parents are not living together or where one of the guardians or parents is dead. When an access application by a non-guardian was heard, it would be possible to place restrictions on access beyond the usual "in the best interests of the child" test.

These restrictions could require that:

- There has been frequent and positive contact in the past and that continuing contact would be in the best interests of the child.
- Where a guardian is opposed to access by a person who is not a guardian, the court could not allow access unless it can be shown that it is so clearly in the best interests of the child as to make the guardian's opposition unreasonable.

Currently, grandparents are able to apply for access based on the best interests of the child. Criteria include the history of the grandparents' association with the child and the child's views and wishes. The current provision has been criticized by some because the application can be brought at any time and is not restricted to situations where the guardians are living separate and apart or where a parent is deceased.

Questions:

3.6.a. Is the list of persons who can apply for access appropriate? Should anyone be added or dropped from the list?

3.6.b. Should access applications by non-guardians be restricted to the situations where guardians or parents are not living together or where one of the guardians or parents is dead?

3.6.c. Are the proposed restrictions on access by non-guardians appropriate? Would you add or delete any of the conditions?

3.6.d. Should the same conditions for access apply to grandparents as apply to other non-guardians? If not, what conditions if any should apply to access for grandparents?

3.7. Child Access and Support

Issue for discussion: Link between access and child support.

Background:

Currently, case law maintains a separation between access and child support. Access is not withheld to force payment of child support, nor is child support made contingent upon receiving access. The rationale is that denying access to force payment of support, and visa versa, would cause further harm to the child. However, the suggestion has been made that there may be some cases in which it would be appropriate for a court to link access and payment of support. The new law could expressly give the court the discretion to link access and support.

Question:

3.7.a. Should the court have the discretion to link access and child support or should the two continue to be kept separate?

4. Court Jurisdiction and Powers

Overview

Over time, some aspects of provincial legislation involving family law have become out-dated, particularly given the way in which Albertans now live their lives. Family Law Reform has identified a number of areas where the courts' jurisdiction and powers within family law could be consolidated or updated.

4.1. Provincial Court Jurisdiction to Make and Enforce Support Orders

Alberta Justice proposes that the Provincial Court continue to have jurisdiction to make and enforce support orders but that the requirement for the court to find matrimonial fault be eliminated. It is further proposed that the Provincial Court's jurisdiction expand to include persons in conjugal and other interdependent relationships that do not involve marriage and all children of such interdependent relationships.

4.2. Matrimonial Actions

There are a number of matrimonial laws in Alberta that are out-dated or redundant. Therefore, the following changes are proposed:

- That the law that enables the court to order a person to resume cohabitation with another person be repealed.
- That the law that allows a person to seek damages for adultery be repealed.
- That the law that allows a married person to seek damages against a third party for inducing that person's spouse to leave the marriage, or for harbouring the deserting spouse, be repealed.
- That the law that allows a parent to seek damages against a third party for enticing, harbouring or seducing a child be repealed.
- That the ordinary law of gifts be expanded to include engagement gifts, including the engagement ring.

- That the law that allows a person to ask the court to declare the validity of a marriage and grant an injunction against someone making a false claim of marriage be repealed.

4.3. Judicial Separation

Issue for discussion: Retention of judicial separation as an option to divorce.

Background:

Judicial separation legally ends the duty of married persons to live together. Several cases of judicial separation are brought to the courts each year as an alternative to divorce although it is unknown why the parties do so. If the judicial separation option is to be retained, it's proposed that legislation remove the existing matrimonial fault requirements and bring judicial separation in line with the terms and conditions of the federal *Divorce Act*.

Question:

4.3.a. Are there reasons why judicial separation should be retained as an option for married persons?

4.4. Breach of Promise of Marriage

Issue for discussion: Retention of the right to seek damages for failure to keep a marriage commitment.

Background:

Current Alberta family law permits a person to sue another person if that individual fails to keep a promise of marriage. It is believed by many that this law is obsolete given today's societal views of engagement and marriage. Others believe such a law still has value. Alberta Justice suggests that if the law is retained, it should be restricted to claims that seek to recover expenses incurred as a result of the marriage promise.

Question:

4.4.a. Should the right to sue over breach of promise of marriage be retained? If so, should such claims be restricted to recovering expenses?

4.5. Matrimonial Property Act

Issue for discussion: Estate application by a surviving spouse.

Background:

It is proposed that the *Matrimonial Property Act* be amended so that upon the death of a spouse, the surviving spouse can seek the division of property acquired over the course of the marriage even if the spouses continued to reside together until death. The rights of the surviving spouse under the *Matrimonial Property Act* would be in addition to the rights of the surviving spouse under the will of the deceased spouse or upon intestacy.

Question:

4.5.a. Should a surviving spouse have at least the same rights of equal division of matrimonial property as a spouse has under the *Matrimonial Property Act* when there has been a breakdown of the marriage?

5. Personal Relationships

Overview

Married Relationships

The Alberta Government believes marriage can only exist between a man and woman. Alberta family law will continue to recognize this distinction. Any legislative changes in the area of personal relationships would ensure that the unique nature of marriage is protected.

Many benefits and obligations that Alberta legislation applies to married persons involve financial or property interests between spouses or between a spouse and others. For example:

1. The *Intestate Succession Act* provides for distribution of an estate to the surviving married spouse and the children of a person who dies without a will.
2. The *Matrimonial Property Act* establishes that property acquired during a marriage must be shared equally when the marriage ends.
3. The *Alberta Personal Income Tax Act* uses marital status as a factor in calculating income tax.

Unmarried Relationships

In recent years, some Alberta laws have recognized the existence of unmarried relationships between men and women. Called common law relationships, they are relationships where there is a degree of permanence and interdependence. These personal, interdependent relationships can raise the same financial and property issues that arise between married persons. As a result, some but not all of the benefits and obligations that apply to married persons have been extended to common law relationships.

The *Canadian Charter of Rights and Freedoms* ("*Charter*") guarantees to every individual the equal benefit of the law. Our courts have held that relationships similar in nature should have similar benefits and obligations. The Supreme Court of Canada has ruled that two persons in a common law relationship must be treated the same as two persons who are married, and two persons in a same sex relationship must be treated the same as two persons who are in a common law relationship. The right to equality prohibits discrimination based on marital status or sexual orientation.

The federal government and most other provinces have already extended some or all of the benefits and obligations of married persons to persons involved in common law and same sex relationships. These changes affected a large number of laws. For example, in Ontario 67 statutes were amended, in Saskatchewan 25 statutes were amended and the federal government amended 68 statutes.

In Alberta, providing unmarried persons in committed, interdependent relationships with benefits and obligations similar to married persons would include, but not be limited to, the following:

- An obligation to financially support each other.
- The right to apply for a protection order under the *Protection Against Family Violence Act*.
- An obligation on the estate of a deceased partner to adequately provide for the surviving partner.
- The right to notice from the Medical Examiner under the *Fatality Inquiries Act.*
- The right to recover damages for a wrongful death of a partner.
- An obligation to avoid conflict of interest situations that include the interests of the partner.
- The right to survivor benefits in pensions.

- The consideration of both partners' incomes in calculations of financial benefits and obligations under Acts such as the *Alberta Personal Income Tax Act* and the *Assured Income for the Severely Handicapped Act.*
- The right to survivor benefits under the *Worker's Compensation Act.*
- The right to receive all or a portion of the partner's estate should the partner die without a will.
- The right, under the *Matrimonial Property Act,* to share in property acquired by both parties during the relationship.

The benefits and obligations that Alberta legislation currently applies to married spouses would not change as a result of extending benefits and obligations to persons who are not married.

Options for Alberta

Alberta Justice proposes that Alberta's legislation concerning personal relationships be amended to comply with the *Charter.* Alberta can comply with the *Charter* in one of two different ways. One option is to extend to unmarried persons in **Conjugal Relationships** legal benefits and obligations similar to those currently provided to married persons. Conjugal relationships are relationships of a long-term, committed nature where two adults live together and sexual intimacy can be expected. This would include persons in common law or same sex relationships.

The other option is to extend to unmarried persons in committed **Interdependent Relationships** legal benefits and obligations similar to those currently provided to married persons. This option recognizes that, in addition to common law and same sex persons, there are people in unmarried relationships that are platonic but involve economic and emotional interdependency. For example, an adult child living with an elderly parent or an adult brother or sister living together.

If Alberta decided to pass legislation based on interdependent relationships, some exceptions would have to be made. For example, there are pension plans where the ability to register the plan depends on provincial legislation including certain groups that are set out in federal legislation. Alberta cannot jeopardize the ability to register those pension plans and must, therefore, follow the federal approach.

The following sets out in more detail how benefits and obligations may be extended under a Conjugal Relationships model or an Interdependent Relationships model.

Option 1: Conjugal Relationships model

Under this model, benefits and obligations provided to married persons would be extended to persons that live together in committed common law or same sex relationships. However, it would not be appropriate to impose benefits and obligations on persons in common law or same sex relationships at the moment they begin living together. Some indication of a long-term commitment to the relationship should be required. It is proposed, therefore, that under this model benefits and obligations would not be applicable to a conjugal relationship unless one of the following three things have happened:

1. Two persons have lived together for at least three years* or
2. Two persons are living together and there is a biological or adopted child as a result of the relationship or
3. Two persons have registered as personal partners**.

* Three years has been chosen in some legislation as the minimum period of time to establish a relationship that has legal consequences. Some research has shown that the average relationship based on cohabitation lasts about two years and then ends. By setting the standard at three years, legislation might be more likely to attach benefits and obligations to only committed relationships and not to casual, temporary, or trial relationships.

** Registration as a personal partnership would be voluntary and would allow for immediate recognition of the relationship. Registration as a personal partnership would also be one means of proving the existence of the relationship. Individuals could register at any time.

Questions:

5.1. Should living together for a minimum of three years be one of the criteria for determining when an unmarried person is in a committed, conjugal relationship? If not, would one or two years be more appropriate?

5.2. Do you agree that two persons that live together and have a biological or adopted child are in a committed relationship that should have benefits and obligations attached?

5.3. Are there other criteria you would recommend that would indicate two persons are in a committed, conjugal relationship?

Option 2: Interdependent Relationships model

As noted earlier, most Alberta laws that pertain to personal relationships are designed to help the two people in the relationship deal with financial or property interests. It may be reasonable to extend the same help, in the form of legal benefits and obligations, to all committed relationships that are economically interdependent, and not just to married persons or persons in conjugal relationships.

It is possible that the same degree of commitment and interdependence normally associated with conjugal relationships may also be found in platonic relationships.

Therefore, under this model, benefits and obligations would be extended to any two adults living together in a long-term, committed relationship of economic and emotional interdependence. This would include conjugal and platonic relationships.

Under this model, emphasis would be placed on economic interdependency. While an emotional interdependency would exist, the intermingling of finances and property to a degree where economic interdependency exists would be a key measure of whether the relationship is interdependent.

As in the conjugal model, it would not be appropriate to impose benefits and obligations on every two adults who live together. Some criteria would be needed to establish what relationships would qualify as interdependent relationships. Since interdependent relationships include a large variety of personal relationships, the criteria should be broad enough to capture situations like two unmarried elderly brothers who live together and operate a business together but not so broad as to include two university roommates who share room and board for four years.

Therefore, it is proposed that under this model, legal benefits and obligations would not be applicable to the relationship unless the two persons in the relationship were financially and emotionally interdependent AND one of the following three things has happened:

1. They have lived together for at least three years or
2. They are living together and there is a biological or adopted child as a result of the relationship or
3. They have registered as personal partners.

Interdependency could be determined based on a number of factors. These factors could include:

- The relationship's purpose, duration, constancy and degree of exclusivity or commitment.
- The conduct of the two persons regarding household arrangements.
- The degree to which the two persons mix their finances.
- The degree to which the two persons formalize legal obligations and responsibilities to one another.
- Whether the two persons share in co-parenting a child.
- The degree to which the two persons demonstrate to others they are emotionally and financially committed to each other on a permanent basis.

- The extent to which contributions have been made by either partner to the other or to their mutual well-being.

Registration of an interdependent relationship would be available and would result in immediate recognition of the relationship. It would also be one means of proving the existence of an interdependent relationship. Individuals could register at any time.

There may be a concern that the criteria for interdependent relationships could capture some platonic relationships that do not need to be included and involve people who do not want to be part of an interdependent relationship. A registry for interdependent partnerships could resolve this concern. Such a registry could allow two persons in a platonic relationship to clearly indicate whether they wish to be recognized as personal partners in an interdependent relationship that has legal benefits and obligations attached.

This would also allow people to mutually support each other in a platonic relationship but not incur the legal benefits and obligations of an interdependent relationship unless they chose to do so. For example, adult children who live with a parent and contribute to household expenses for a number of years may not wish to be considered interdependent partners.

This concern could be addressed by doing either one of the following:

1. Allow two persons in platonic relationships to opt out of the benefits and obligations of an interdependent relationship. They might do this by a written agreement that they do not wish to be considered an interdependent relationship; or
2. Require persons in platonic relationships to opt into the benefits and obligations of an interdependent relationship. They might do this by registering as an interdependent relationship.

Questions:

5.4. Alberta laws could be amended to give benefits and obligations to all adult persons in committed personal relationships. Should this include only those in committed, conjugal relationships or should it also include those in committed, platonic relationships?

5.5.a. Should a relationship that is platonic be considered an interdependent relationship simply by satisfying the criteria or should persons in this kind of relationship be required to take some active step to indicate they wish to be considered a partner in an interdependent relationship?

5.5.b. If some active step is required:

- Should the requirement be that they may opt in by registration, if they decide they wish to have benefits and obligations legally attached to their relationship?

Or

- Should they be required to enter into a contract in writing that says that they are not an interdependent relationship, if they do not want to have the benefits and obligations of the relationship?

5.6. Is the definition of an interdependent relationship appropriate? If not, what changes would you suggest?

5.7. Are the factors, which could be used in determining the validity of an interdependent relationship reasonable? Are there other factors you would suggest?

Application of the Two Models

Examples are the easiest way of contrasting the two models. In this part, we look at four statutes and discuss how reform could proceed under each model.

Domestic Relations Act

Presently, the *Domestic Relations Act* allows a court to make a spousal support order after the separation of married spouses or persons in a common law relationship where the parties have cohabited together for at least three years.

Option 1: Conjugal Relationships Model

The Supreme Court of Canada has said that similar obligations must be imposed on two persons in a same sex relationship. This would be accomplished under the conjugal model by extending the existing spousal support obligations to two persons in a same sex relationship.

Option 2: Interdependent Relationships Model

When it involves support obligations, society's expectations may differ between conjugal and platonic relationships. The question under this model is whether support obligations should be imposed on both conjugal and platonic relationships of interdependence.

For example, should two sisters who have resided in a relationship of emotional and economic interdependence for many years be obliged to support each other once the relationship has ended? Should a young adult child who lives with his or her parent for a number of years in a relationship of interdependence have to support the parent after the child leaves the household?

Family Relief Act

In Alberta, a surviving spouse, minor child or a disabled adult child who is unable to earn a livelihood can apply for further provision from the estate of the deceased, where the deceased failed to make adequate provision for their continued maintenance and support.

Option 1: Conjugal Relationships Model

Many provinces have already extended such rights to common law spouses and same sex partners. Under this model, common law spouses and same sex partners in Alberta would be allowed to make similar applications.

Option 2: Interdependent Relationships Model

Society may wish to recognize and support platonic relationships in a similar way. The question is whether a person in a committed, platonic relationship should have an obligation to maintain and support the other person in the relationship after death. For example, should a surviving sister be able to bring an action for adequate maintenance and support from her sister's estate if the two lived in an interdependent relationship? Should an adult child who is not disabled be allowed to seek adequate maintenance and support from a deceased parent's estate if the two had lived in an interdependent relationship? Would an obligation of maintenance and support encourage or discourage persons in platonic relationships from living together?

Intestate Succession Act

This statute determines how a person's estate is to be distributed if that person dies without a will. The distribution scheme ensures that the estate goes to the closest family members.

If a person is survived by a spouse, but is not survived by any children or grandchildren, the entire estate goes to the surviving spouse. If the deceased is survived by a spouse and children, the spouse takes $40,000 plus one-half of the remaining estate (if there is one child) or one-third of the remaining estate (if there is more than one child). The children receive what does not go to the spouse, and the children share this portion equally. If a person is survived by children but no spouse, the entire estate is divided equally among the children. If there is no surviving spouse or children or grandchildren, the estate goes to the nearest relatives.

The existing distribution scheme was designed to serve a society in which wealth was transferred from one generation to another, inheritance between spouses was exceptional, most families lived within marriage, and divorce was rare. To serve modern society, the distribution scheme could be reconfigured so it is recognized that the spouse is the primary beneficiary, a significant number of families live outside marriage, and divorce is more common.

Option 1: Conjugal Relationships Model

The *Charter* requires that common law spouses and same sex partners be treated in the same fashion as spouses under the *Intestate Succession Act*. This would be accomplished under the conjugal relationships model. The difficult question is how to deal with the reality of divorce and second marriages in our society. Studies show that the majority of spouses give their entire estate to the surviving spouse when the deceased's children are of that relationship. Spouses give their surviving spouse something less when they have children from another relationship. The spousal share is still generous, but it does not amount to the entire estate.

Should the *Intestate Succession Act* reflect this difference in approach between first and second relationships? If so, what should the spousal share be in a situation where the deceased is survived by a spouse and children, some or all of who may be from another relationship? Should the spouse in this situation receive a fixed amount plus some portion of the remaining estate, or should the estate be divided amongst the spouse and children of the deceased?

Option 2: Interdependent Relationships Model

Currently, the *Intestate Succession Act,* as interpreted by the courts, only recognizes conjugal relationships and relationships of blood and adoption. If a woman is living with her sister at the time of death and is survived by other siblings, the entire estate is distributed equally among all of the siblings. If a mother is living with her child at the time of death and is survived only by her children, the entire estate is distributed equally among all the children.

Under an interdependent relationships model, it is unknown whether persons who live with relatives in relationships of interdependence would want to give more to that relative than the current Act provides. For example, would a sister want to give more to the sibling with whom she lives in an interdependent relationship or would she want to divide her estate equally among all of her siblings? Would a mother who lives with one of her children in an interdependent relationship want to give a greater share to that child or would she want to divide her estate equally among all of her surviving children? If a sibling or a child is to be preferred, what share of the estate should they receive?

Matrimonial Property Act

Under this Act, the property acquired during a marriage is divided equally between the spouses upon breakdown of the relationship. The purpose of the statute is to recognize the contribution of both spouses to a marriage.

Option 1: Conjugal Relationships Model

Extending this legislation to include common law spouses and same sex partners is currently before the courts. It has yet to be decided if excluding unmarried persons from this statute is contrary to the *Charter*. Even if it is found to not contravene the *Charter*, the question remains as to whether this Act should be extended to common law spouses and same sex partners.

Option 2: Interdependent Relationships Model

Under the interdependent relationships model, the Act could be extended to include both conjugal and platonic relationships of interdependence. For example, two sisters who live together in a relationship of interdependence could be entitled to share in the property acquired by either sister over the course of the relationship. If so, should the property be divided equally or should the method of division depend upon the particular circumstances of the relationship? Another option would be to create a property division formula for platonic relationships that is distinct from the formula used for conjugal relationships.

Section II

Summary of Questions

1. Spousal Support

No specific questions.

2. Child Support

2.2.a. Should child support by a parent continue once a child turns 18?

2.2.b. If support should continue, should there be a distinction made between intact families and families that have separated?

2.2.c. If support should continue, should support be limited to:

- Children who have an illness or disability?
- Children who are engaged in further education (i.e. attending high school, college or university)?
- Children who are otherwise unable to become independent?

2.4.a. Should standard child support guidelines apply to persons acting in the place of a parent?

3. Guardianship, Custody and Access

3.2.a. Should there be any special provisions to deal with testamentary guardianship in a non-intact family where the parents are no longer joint guardians?

3.2.b. Should the responsibilities of the deceased guardian flow to the surviving guardian or to the guardian appointed by the deceased guardian?

3.4.a. Should provincial and federal legislation regarding parenting arrangements be consistent?

3.4.b. Are the attributes for parenting arrangements appropriate? What changes if any would you suggest?

3.6.a. Is the list of persons who can apply for access appropriate? Should anyone be added or dropped from the list?

3.6.b. Should access applications by non-guardians be restricted to the situations where guardians or parents are not living together or where one of the guardians or parents is dead?

3.6.c. Are the proposed restrictions on access by non-guardians appropriate? Would you add or delete any of the conditions?

3.6.d. Should the same conditions for access apply to grandparents as apply to other non-guardians? If not, what conditions, if any, should apply to access for grandparents?

3.7.a. Should the court have the discretion to link access and child support or should the two continue to be kept separate?

4. Court Jurisdiction and Powers

4.3.a. Are there reasons why judicial separation should be retained as an option for married persons?

4.4.a. Should the right to sue over breach of promise of marriage be retained? If so, should such claims be restricted to recovering expenses?

4.5.a. Should a surviving spouse have at least the same rights of equal division of matrimonial property as a spouse has under the *Matrimonial Property Act* when there has been a breakdown of the marriage?

5. Personal Relationships

5.1. Should living together for a minimum of three years be one of the criteria for determining when a unmarried person is in a committed, conjugal relationship? If not, would one or two years be more appropriate?

5.2. Do you agree that two persons that live together and have a biological or adopted child are in a committed relationship that should have benefits and obligations attached?

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